Nos. 83-141, 83-283, and 83-236

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In the Supreme Court of the United States

OCTOBER TERM, 1983

HAWAII HOUSING AUTHORITY, et al.,
Appellants,

vs.

FRANK E. MIDKIFF, et al.,
Appellees.

KAHALA COMMUNITY ASSOCIATION, INC., et al.,
Appellants,

vs.

FRANK E. MIDKIFF, et al.,
Appellees.

PORTLOCK COMMUNITY ASSOCIATION, et al.,
Appellants,

vs.

FRANK E. MIDKIFF, et al.,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES

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BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of appellees. Consent to the filing of this brief has been granted by counsel for all parties. Copies of these letters of consent have been lodged with the clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation, organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for PLF is established by an independent Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only when it concludes that the Foundation's position has broad support within the general community. The PLF Board has authorized the filing of this brief.

The Hawaii Land Reform Act, Hawaii Rev. Stat. Ch. 516 (HLRA), is intended to accomplish the redistribution of private ownership of property through the use of the state's power of eminent domain. While just compensation is theoretically available, property owners are forced to make what amounts to involuntary private land transfers. The state should not be free discriminatorily to use its eminent domain power on behalf of selected private groups or individuals. The right to own and retain property is as entitled to reasonable legal protection as the right to obtain just compensation when condemnation is required for a truly public use.

Under traditional Fifth Amendment interpretations, government may only take property for a "public use" or purpose with the goal of putting the property to a new or different use than it would serve absent the taking. HLRA does not meet this standard. While government may need broad powers to obtain property for the good of the people, it should not be free to lend or sell its eminent domain power when the result is intended only to benefit favored classes, not the general public. The power to force private land transactions is too important and coercive to be justified where the benefit to the public is incidental or occurs solely because the coerced transfer brings some sense of satisfaction to the private transferees.

If the private land transfer scheme established by HLRA is validated, then the "public use" requirement of the Fifth Amendment will cease to provide meaningful protection to private property owners. PLF believes that the decision of the Ninth Circuit in *Midkiff v. Tom*, 702 F.2d 788 (9th Cir. 1983), puts a welcome and necessary cap on the soaring and open-ended dicta of *Berman v. Parker*, 348 U.S. 26 (1954), and believes that absent such limits on what may be considered a "public use" for purposes of eminent domain, private citizens will be all but powerless to resist condemnations which chiefly serve purely private interests.

Pacific Legal Foundation believes that its position, in support of private property rights, has broad public support, and that its public policy perspective will help it provide this Court with a more complete briefing of the interests at stake in this litigation. Pacific Legal Foundation has filed amicus curiae briefs in *San Diego Gas &*

Electric Co. v. San Diego, 450 U.S. 621 (1981); *State of California v. Superior Court (Lyon)*, 29 Cal. 3d 210, *cert. denied sub nom., Lyon v. California*, 454 U.S. 865 (1981); *State of California v. Superior Court (Fogerty)*, 29 Cal. 3d 240, *cert. denied*, 454 U.S. 865 (1981); and *City of Los Angeles v. Venice Peninsula Properties*, 31 Cal. 3d 288 (1982), *cert. granted sub nom., Summa Corp. v. State of California, ex rel., State Lands Commission and City of Los Angeles*, No. 82-708 (October Term, 1982).

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 702 F.2d 788 (9th Cir. 1983). A copy of the opinion is reprinted as Appendix A to the Hawaii Housing Authority's Jurisdictional Statement.

STATEMENT OF THE CASE

The initial version of the Hawaii Land Reform Act, Hawaii Rev. Stat. Ch. 516, was enacted in 1967 "to provide means by which the lessees of residential leasehold lots may become vested with the fee simple title to their lots."[1] In 1975, the Hawaii Legislature sought to strengthen HLRA's pretensions of constitutional validity by finding that the fee simple ownership of residential land in the state was concentrated "in the hands of a few landowners,"[2] that those landowners engage "in the practice of leasing their lands under long-term leases,"[3] and that this

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[1]Conf. Comm. Rep. No. 19 on S.B. No. 1128 (Act 307), 1967 Senate Journal 800; Conf. Comm. Rep. No. 18 on S.B. No. 1128 (Act 307) 1967 House Journal 859.

[2]Hawaii Rev. Stat. § 516-83(a)(1).

[3]*Id.*

practice has resulted in a shortage of "fee simple residential land"[4] and led to the "inflationary trend of land."[5] Beginning in 1978 the Hawaii Housing Authority (HHA) began involuntarily condemning private property pursuant to HLRA and extensive federal and state litigation ensued.

Under HLRA, proceedings to condemn may be commenced after lessees of at least 25 residential lots or 50% of such lots (whichever is less) in a "development tract" (a residential development not less than five acres in size) have applied to HHA to purchase the fee interest in their leased lots;[6] proceedings are never commenced on the state's initiative (although HHA may acquire a fee interest in some of the lots under certain circumstances).[7] Interestingly, applicant-lessees must, among other things, have a bona fide intent to live in the development tract or in Hawaii (thus apparently recognizing that these lessees may go on to rent the residences themselves).[8] Applicant lessees must put down a deposit for, and pay, the condemnation expenses incurred by HHA and the value of the property condemned.[9] In the condemnation action the lessees are named as parties and title is transferred to them.[10] Under HLRA, HHA can condemn entire development tracts or specified lots within tracts.[11]

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[4]Hawaii Rev. Stat. § 516-83(a)(2).

[5]Hawaii Rev. Stat. § 516-83(a)(7).

[6]Hawaii Rev. Stat. §§ 516-22 and 516-1(2).

[7]Hawaii Rev. Stat. § 516-22.

[8]Hawaii Rev. Stat. § 516-33(2).

[9]Hawaii Rev. Stat. § 516-33(4).

[10]Hawaii Rev. Stat. § 516-30.

[11]Hawaii Rev. Stat. § 516-22.

In *Midkiff v. Tom*, 471 F. Supp. 871 (D. Hawaii 1979), the District Court held that Hawaii may use its power of eminent domain to redefine, remanage, or redistribute interests in land but restrained the use of the valuation formula and compulsory arbitration required by HLRA. In a subsequent decision, *Midkiff v. Tom*, 483 F. Supp. 62 (D. Hawaii 1979), the District Court granted summary judgment against the property owners, refusing to hear evidence offered to refute the factual findings of HLRA, and holding "that land redistribution constitutes a permissible public purpose encompassed by the police power." 483 F. Supp. at 69. Alternatively, the court also held that the Legislature's economic findings demonstrated that the Legislature had not acted arbitrarily in enacting the statute, stating: "In order to prevail, plaintiffs must demonstrate that the statute is arbitrary with respect to every possible economic rationale for the statute—stated and unstated." 483 F.Supp. at 70.

On appeal, a panel of the Ninth Circuit reversed and remanded the District Court's decision stating (per Judge Alarcon):

> "We must decide whether the Federal Constitution permits a state to take the private property of A and transfer its ownership to B for his private use and benefit. It is our view that it was the intention of the framers of the Constitution and the fifth amendment that this form of majoritarian tyranny should not occur." *Midkiff v. Tom*, 702 F.2d at 790.

In a lengthy and strong dissent, Judge Ferguson characterized HLRA as a "program of residential land reform" and argued that "[a]bstention, and, failing that, deference to legislative judgment, was uniquely appropriate in this case . . . ." 702 F.2d at 809.

SUMMARY OF ARGUMENT

1. Constitutional protections of personal rights in property are fundamental and should not be diminished or waived on the strength of legislative declarations.

2. The probably unplanned, but nonetheless steady and systematic, gutting of the "public use" requirement of the Fifth Amendment has led Hawaii to the point where, absent the judicial resurrection of the intended meaning of the "public use" requirement, the state has come to expect that it will be able to lend its power of eminent domain to favored private citizens to obtain fee simple title to the property of others so long as "proper" findings are declared. Erosion of the "public use" limit on the eminent domain power should not be allowed to proceed so far as to allow coerced private land transfers having only psychic or incidental public benefits. "Public use" should be measured by results, or at least planned results, not by mere declarations.

3. Validation of the Hawaii Land Reform Act would imperil interests in property other than land.

4. Hawaii should not be able to use its eminent domain power discriminatorily to create a superior class of residential landowners from the Balkanized landholdings of the present owners.

ARGUMENT

I

PROTECTION OF PERSONAL RIGHTS IN PROPERTY IS A FUNDAMENTAL PRECEPT OF THE FEDERAL CONSTITUTION AND HAS EQUAL APPLICATION TO ISLAND STATES

The Constitution not only seeks to establish a democracy, but also to create a framework in which democracy can survive and even thrive. Of equal general importance, and of particular significance in these cases, the Constitution, in its Bill of Rights and elsewhere, sets limits on what government or a majority may do to individual citizens or minorities. Thus, the Constitution also establishes protections from popular, but improper, abuses. One of these limits is that the government may not take private property without just compensation nor may it be taken for other than a "public use."[12]

For nearly two centuries, American political scientists and legal scholars have pointed to protection of personal rights in property as the fundamental motivation for adoption of the Federal Constitution.[13] In keeping with the drafters' intentions, express constitutional restrictions on governmental interference with private property have been augmented by court-made doctrine. Nineteenth Century jurists broadly construed the Contract Clause, United

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[12]U.S. Const. Amendment V: "[N]or shall private property be taken for public use, without just compensation." The Fifth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Missouri Pacific Railway Co. v. Nebraska*, 164 U.S. 403, 417 (1896).

[13]*See* Bernard Siegan, *Economic Liberties in the Constitution* Chapters 2-4 (University of Chicago Press 1980).

States Constitution, Article I, Section 10, as a means of protecting vested property rights against unjust state interference. *E.g., Fletcher v. Peck,* 10 U.S. (6 Cranch) 87 (1810); *Trustees of Dartmouth College v. Woodward,* 17 U.S. (4 Wheat.) 518 (1819). Later, this Court turned to the Due Process Clause of the Fifth Amendment as a restriction on economic legislation. *Mugler v. Kansas,* 123 U.S. 623 (1887).

This Court has unambiguously indicated that the Fifth Amendment guarantee that private property shall not be taken for public use without just compensation operates as a limitation on the exercise of the police power. *Goldblatt v. Hempstead,* 369 U.S. 590 (1962); *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922). In particular the Court has recognized that a taking of property causes special, severe injuries:

> "Moreover, an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property. . . . [P]roperty law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. See Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law, 80 Harv L Rev 1165, 1228, and n 110 (1967). Furthermore, such an occupation is qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion." *Loretto v. Teleprompter Manhattan CATV Corp.,* ..... U.S. ....., 102 S. Ct. 3164, 73 L. Ed. 2d 868, 883 (1982) (emphasis in original).

However, despite this recognition and the consequent safeguards created by this Court, states and political subdivisions have, during the past 50 years, made disturbing inroads on the institution of private property.

Despite this Court's recognition of the "special kind of injury" which occurs when an owner is deprived of his property, Hawaii apparently believes that its particular patterns of landownership provide some form of waiver to otherwise generally applicable constitutional guarantees. Even HLRA's staunch defenders admit that there is an "almost instinctive feeling that the Hawaii Act is radical . . . ." Conahan, *Hawaii Land Reform Act: Is It Constitutional?*, 6 Hawaii B.J. 31, 53 (1969), *cited* in *Midkiff*, 702 F.2d at 808 (dissenting opinion of Ferguson, J.). Rather than face the solid commonsense instincts which give rise to this constitutional queasiness, these defenders suggest that this feeling will go away if the political realities of land reform in Asia and Latin America are considered "if only subconsciously," or if one disposes of the "assumption" that landownership in Hawaii is similar to that "in most parts of continental United States." *Id.* Actually, it is HLRA's supporters who are laboring under an invalid assumption that landownership is more widespread in the continental United States than in Hawaii. In fact, this is not the case:

> "Ownership of land [in the United States], and the associated wealth as measured by the value of land, is concentrated in the hands of a few. Less than 0.5 percent of the largest owners hold 40 percent of the land, while 78 percent of the smallest owners hold about 3 percent of the land." James A. Lewis, *Landownership in the United States, 1978;* Agriculture

> Information Bulletin No. 435, United States Department of Agriculture, Natural Resource Economics Division, at ii.

This very situation, which Hawaii believes justifies its draconian land transfer law, was anticipated by James Madison and used as a reason for providing extra protection against such forced transfers:

> " 'In future times a great majority of the people will not only be without landed, but any other sort of, property. These [may] . . . combine under the influence of their common situation; in which case, the rights of property & the public liberty, [will not be secure in their hands] . . . .' " 2 The Records of the Federal Convention of 1787 203-04 (M. Farrand ed. 1911) (footnotes omitted), *cited* in *Midkiff*, 702 F.2d at 791.

Of course, the requirements of the Constitution do not vary geographically or demographically. While the use of private property can sometimes pose difficult social issues, these difficulties can often be resolved by the application of relatively simple principles: (1) the Constitution, while flexible, may not be altered to fit perceived local circumstances, and (2) "public use," if the phrase is other than purely ornamental, must have something to do with use by the public.

II

THE REQUIREMENT THAT A TAKING OF PROPERTY BE "FOR PUBLIC USE" OUGHT NOT TO BE DELETED FROM THE FIFTH AMENDMENT

A. The "Public Use" Requirement Is One of Only Two Restraints on a Very Significant Power

This litigation may well determine whether "public use" continues to survive as a meaningful part of the Federal Constitution, or joins the Ninth and Tenth Amendments.

In essence, the power of eminent domain allows the state to compel the substitution of a judicial proceeding for a market transaction as a means of acquiring property. By its very nature it is a coercive power. Despite this, "[t]he only limitations placed upon the exercise of the right of eminent domain by . . . the United States Constitution (Fourteenth Amendment) are that the taking be for a 'public use' and that 'just compensation' be paid for such taking." *People v. Chevalier*, 52 Cal. 2d 299, 304 (1959). *See also City of Oakland v. Oakland Raiders*, 32 Cal. 3d 60, 64 (1982). However, as a practical matter

> "[i]t is obvious that in most jurisdictions, the owner opposing the taking of his property for an urban renewal project will have a most difficult time challenging the taking as not being for a 'public use' because it is really being taken for the benefit of the local industrial giant, or for the latest model shopping center, or for almost anything the city council-redevelopment agency visualizes as an aesthetic or economic asset to the city." Molho and Kanner, *Urban Renewal: Laissez-Faire for the Poor, Welfare for the Rich* (*Urban Renewal*), 8 Pac. L.J. 627, 694 (1977).

B. The Framers of the Constitution Intended the Phrase "Public Use" to Have Its Plain Meaning

"The federal courts and most state courts have vied with one another in expanding the *Berman* [*Berman v. Parker*, 348 U.S. 26, (1954)] reasoning to the point where the 'public use' limitation has little meaning, if any, as a constitutional guarantee." *Id.* at 695. Historical evidence suggests that this was not the intention of the framers of the Constitution.

From judicial decisions made at the time of the earliest English settlements in the New World, it is apparent that land use restrictions were considered perfectly appropriate so long as they were intended to promote "the public benefit." For example, in *The Case of the King's Prerogative in Saltpetre*, 12 Co. Rep. 12, 13 (1606), 77 E.R. 1294, 1295, it was concluded that the King's agents could remove saltpetre from private land in order to make gunpowder for the defense of the realm because "every subject hath a benefit by it . . . for this is for the public, and everyone hath benefit by it." The phrasing certainly suggests the term "public" did not refer to particular individuals or selected segments of the public, but to benefits which extended to "every subject."

State constitutions considered shortly before the adoption of the Federal Constitution attempted to insure the proper interpretation of the phrase "public use" by adding a requirement that the taking also be required by necessity. For example, the first state constitution approved by Vermont's Legislature (but which was not ratified by the people of the state) in 1777 provided, in part, "[t]hat private property ought to be subservient to public uses

when necessity requires it . . . ." Bosselman, Callies, and Banta, *The Taking Issue* 94 (United States Government Printing Office 1973). Similarly, the original Massachusetts Constitution of 1780 provided, in part: "[W]henever the public exigencies require, that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." *Id.* at 95.

Sir William Blackstone's *Commentaries*, which most members of the Constitutional Convention "were familiar with,"[14] took a far stronger view of property rights:

> "So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. *Besides, the public good is in nothing more essentially interested than in the protection of every individual's private rights, as modeled by the municipal law.*"[15]

Blackstone's description of the public's essential interest in the protection of private rights, as now embodied in our

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[14]David A. Lockmiller, *Sir William Blackstone* 174 (1938). *See also* Richard B. Morris, *The American Revolution 1763-1783: A Bicentennial Collection* 152, 154 (1970).

[15]Robert Malcom Kerr, *The Commentaries on the Law of England of Sir William Blackstone*, 100-09 (1876); 1 Blackstone *Commentaries* at 138-39 (emphasis added).

Federal Constitution, stands in stark contrast with the values embedded in HLRA's findings that, among other things, the "happiness of the people of the State" will be promoted through "[t]he acquisition of residential land" owned by their landlords. Hawaii Rev. Stat. § 516-83(a)(5).

C. Validation of the Hawaii Land Reform Act's Land Transfer Scheme Would Take "Public Use" Beyond Any Reasonable Definition and Render the Phrase Pointless

This Court's decision may well tell if "public use" has so devolved that forced transfers of private land from lessors to lessees qualify because of the "happiness,"[16] "general welfare,"[17] full enjoyment,[18] and "security"[19] which the Hawaii Legislature finds such transfers will bring to the state's lessees.[20] In any event, it is clear that the phrase has come to mean a great deal less than its

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[16]Hawaii Rev. Stat. § 516-83(a)(5).

[17]Hawaii Rev. Stat. § 516-83(a)(8); *see also* Section 516-83(a)(5).

[18]Hawaii Rev. Stat. § 516-83(a)(3).

[19]Hawaii Rev. Stat. § 516-83(a)(5).

[20]The Hawaii Legislature made no findings as to the psychological or other effects of eminent domain on the present landlords, presumably either because it had no interest in the subject, or it would have been inconvenient in light of the legislature's predetermined actions. At least one author who has studied the effects of eminent domain on owners and residents displaced by urban renewal has concluded that "the majority . . . speak of their reactions as expressions of *grief*. These are manifest in the feelings of painful loss, the continued longing, the general depressive tone . . . the sense of helplessness, the occasional expressions of both direct and displaced anger, and tendencies to idealize the lost place." Fried, *Grieving for a Lost Home: Psychological Costs of Relocation* (1963), in *Urban Renewal: The Record and the Controversy* 359-60 (J. Wilson ed. 1966) (emphasis in original).

drafters could have foreseen. In large measure this devaluation of the phrase "public use" has come about through confusion with the police power, expansive interpretation, and blind deference to legislative declarations.

The term "public" in the phrase "public use" suffered an early and drastic contraction in meaning when it was discovered that it did not require that "every subject" be benefited, as the early jurists had concluded, but only that someone be benefited.[21] As early as 1923 this Court had succumbed to a "modern view" of the phrase "public use": "Public uses are not limited, in the modern view, to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, recreation, and enjoyment." *Rindge Co. v. Los Angeles*, 262 U.S. 700, 707 (1923). In case this "modern view" did not leave enough leeway, other courts have been quick to suggest that "public use" is elastic enough to cover any public needs,[22] societal condition or scientific advancement.[23]

Much of this evolution was considerably helped by this Court's decision in *Berman v. Parker*, 348 U.S. 26 (1954),

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[21] "It is not essential that the entire community, or even any considerable portion thereof, shall directly enjoy or participate in an improvement in order to constitute a public use." *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 161-62 (1896).

[22] "The concept of public purpose is a broad one. . . . To be serviceable it must expand when necessary to encompass changing public needs . . . ." *Roe v. Kervick*, 42 N.J. 191, 207, 199 A.2d 834, 842 (1964).

[23] "A public use defies absolute definition, for it changes with varying conditions of society, new appliances in the sciences, [and] changing conceptions of the scope and functions of government . . . ." *Barnes v. City of New Haven*, 140 Conn. 8, 15, 98 A.2d 523, 527 (1953).

which began by analyzing whether the District of Columbia Redevelopment Act of 1945 was taking private property for public use, switched into an analysis of the reach of the police power, posited that the definition of the police power was "essentially the product of legislative determinations," and concluded that "[t]he rights of these . . . owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking." *Id.* at 32, 36. In analyzing the *Berman* decision, commentators have concluded that "in terms of the orderly development of constitutional law doctrines, the court not only thoroughly confused the eminent domain power with the police power, but it failed to spell out the precise limits of this new police power . . . ." *Urban Renewal,* 8 Pac. L.J. at 674. While the intention may have been "to promote urban aesthetics" the decision "substantially limited the effect of the public use doctrine as a limitation on governmental condemnation" leading to the conclusion "that the individual citizen, the small landowner who lacks political influence, has considerably less protection under the fifth and fourteenth amendments to the United States Constitution as a result of the *Berman* decision." *Id.* at 676-77.

Berman's deference to legislative declarations had earlier precedent in the *Rindge* decision: " 'That the necessity and expediency of taking property for public use is a legislative and not a judicial question is not open to discussion . . . . The question is purely political, does not require a hearing, and is not the subject of judicial inquiry.' " *Rindge,* 262 U.S. at 709. With the assistance of the *Berman* and *Rindge* decisions, state courts have had no

trouble deferring to purely speculative legislative determinations."[24]

Berman should represent a high water mark in judicial deference to legislative findings. Certainly the *Berman* Court's faith in congressional findings is not merited in this case for several reasons. First, legislatures have grown more sophisticated and have learned to tailor findings to match an intended goal. In other contexts, courts have recognized that government bodies have become astute enough to assert justifications which are acceptable to the judiciary:

> "As overtly bigoted behavior has become more unfashionable, evidence of [discriminatory] intent has become harder to find. But this does not mean that racial discrimination has disappeared. We cannot agree that [the legislature] . . . intended to permit municipalities to systematically deprive minorities of housing opportunities simply because those municipalities act discretely." *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290) 7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

Second, the bulk of the legislative findings and declarations for HLRA were not part of the original statute as enacted in 1967, but were added subsequently, in 1975. Third, most of the findings consist mainly of psychological and economic speculation which appellees were denied any oppor-

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[24]In *Free State Realty Co., Inc. v. City of Baltimore*, 32 Md. App. 11, 359 A.2d 94 (1976), condemnation was allowed because private property might one day become blighted. In *Cannata v. City of New York*, 11 N.Y.2d 210, 182 N.E.2d 395, 227 N.Y.S.2d 903 (1962), condemnation of a vacant lot was allowed because it might someday become a slum.

tunity to test. *Midkiff*, 483 F. Supp. at 65. Finally, in *Berman* the redevelopment plan at least made "detailed provisions for the types of dwelling units to be built in the project area. At least one-third of them were to be low-rent housing with a maximum rental of $17 per room per month."[25] *Urban Renewal*, 8 Pac. L.J. at 674. No such detailed plans exist for the sweeping acquisitions authorized under HLRA. The contrasts suggest the wisdom of the rule that "the Constitution measures the taking of property not by what a State says, or by what it intends, but by what it *does*." *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring) (emphasis in original).

Eminent domain law has been characterized as "a mass of obtuse decisional law that is only occasionally relieved by judicial common sense, pragmatism and candor." Van Alstyne, *Modernizing Inverse Condemnation: A Legislative Prospectus*, 8 Santa Clara L. Rev. 1, 4 (1967). In rejecting the HLRA this Court has a long-overdue opportunity to help return these qualities to the definition of "public use."

III

THE CONTINUED BROADENING OF THE STATE'S POWER OF EMINENT DOMAIN IMPERILS ALL PROPERTY RIGHTS

Any weakening of the "public use" restraint on the power of eminent domain may not be limited to interests in land. In a relatively recent decision, the California Su-

[25] Actually, "[n]o low-cost housing was built in the project area"; instead, "the redevelopers constructed a shopping mall and a complex of high-rent apartments and townhouses." *Urban Renewal*, 8 Pac. L.J. at 674.

preme Court has concluded that "[f]or eminent domain purposes, neither the federal nor the state Constitution distinguishes between property which is real or personal, tangible or intangible." *City of Oakland*, 32 Cal. 3d at 68. While the California Supreme Court's conclusions regarding the Federal Constitution are not binding on this Court, that court cited both *West River Bridge Co. v. Dix*, 47 U.S. (6 Howe) 507, 533 (1848); and *Kimball Laundry Co. v. United States*, 338 U.S. 1, 10-11, 16 (1949), for the proposition that this Court has rejected the claim "that intangible property could not be condemned." *City of Oakland*, 32 Cal. 3d at 66. The Chief Justice pointed out, in her concurring and dissenting opinion, that the condemnation of the Oakland Raiders' franchise contract necessarily includes the "employment contracts between the Raiders and dozens of its employees." 32 Cal. 3d at 77.

Scarce items, tangible or intangible, are, of necessity, generally owned by fewer people. The HLRA mentions that "[l]and, in common with other natural resources, is of finite quantity" and, based on that and supporting speculation regarding the effects of scarcity on inflation and the feeling of well-being which comes with ownership, concludes that condemnation of private land for transfer to a new private owner for the same use constitutes a "public use."[26] If the California Supreme Court is correct regarding the Federal Constitution, then there is no reason to believe that a similar chain of claims would not allow the condemnation of any scarce property, "real or personal, tangible or intangible," 32 Cal. 3d at 68, from McDonald's hamburger franchises to Frank Sinatra concert tickets.

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[26] Hawaii Rev. Stat. § 516-83(a)(9).

IV

THE HAWAII LAND REFORM ACT DISCRIMINATORILY CREATES A SUPERIOR CLASS OF LANDOWNERS

As compellingly outlined in Judge Poole's concurring opinion, the HLRA imposes rent control on residential properties which continue under long-term leases, while simultaneously creating a new class of "lessees-turned-freeholders" who will neither be subject to condemnation nor subject to rent control should they decide to lease their newly-acquired property. *Midkiff*, 702 F.2d at 804. Thus, solely through Hawaii's forceful intervention, the former lessees will have greater property protection than the landowners whose property they have acquired. While landowners are not normally a suspect class for purposes of constitutional analysis, under HLRA they have acquired some of the characteristics of a suspect class. The property rights they are deprived of under HLRA constitute not only important benefits, but fundamental rights. Under the analysis of *Plyler v. Doe*, 457 U.S. 202 (1982), Hawaii's treatment of landowners is, therefore, entitled to heightened scrutiny. *See also J. W. v. City of Tacoma*, ... F.2d ....., 52 U.S.L.W. 2326 (9th Cir., decided November 25, 1983). HLRA is unlikely to survive such scrutiny because the discriminatory treatment it creates furthers no appropriate substantial state goal. There can be no legitimate state interest in taking property from a political minority in order to redistribute it to the political majority. The speciousness of HLRA's rationale is demonstrated by the fact that the law perpetuates the very ills of which it complains.

There is no reason to conclude that long-term leasing by "lessees-turned-freeholders" would not cause the identical harms claimed in HLRA's findings.

CONCLUSION

The Hawaii Land Reform Act has placed in jeopardy the fundamental constitutional right of property. PLF respectfully urges that the decision of the Court of Appeals for the Ninth Circuit finding that Act unconstitutional be affirmed. Any other ruling, including abstention, would effectively remove the "public use" restraint from the Constitution, and condition constitutional safeguards regarding property ownership on unreviewable legislative declarations.

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